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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 330

BALTIMORE TRANSIT COMPANY and
GERALD M. HARRISON,

Petitioners,

v.

STATE OF MARYLAND, For The Use Of
GLORIA S. GEILS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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INDEX.

	Page
Reasons for Reply	1
Conclusion	4

AUTHORITIES.

Cases Cited.

Grier v. Rosenberg, 213 Md. 248, 131 A. 2d 737 ..... 4, 5, 6

Hickory Transfer Co. v. Nezbed, 202 Md. 253, 96 A. 2d 241 ..... 4, 5, 6

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REASONS FOR REPLY.

During the course of trial, the fires of advocacy burn high and their flame encompasses the whole of the adversary proceeding. Both the Court and counsel may momentarily and inadvertently extend the periphery of professional courtesy. Such a course, even momentarily, is not justified in the cold and calculated composition of the brief. It is to this impertinency that the reply addresses itself, including direct misstatements by respondents' counsel.

Were this the initial indiscretion, petitioners would be inclined toward silence. However, respondents' brief in the Circuit Court of Appeals was riddled with vituperative and malicious statements impunging the integrity of counsel to the virtual exclusion of factual and legal argument. The perpetration of that attack is manifest here and demands reply, if upon no other grounds than personal privilege.

Respondents, blinded by the aegis of a new trial, describe petitioners' first question presented as being "a complete distortion." Nor does that question presented "assume the truth of what is simply untrue and have no applicability to this case."

The action of the majority is not unlike that of many appellate courts who give lip service to a doctrine by which they are bound and then render judgments inconsistent with the binding doctrine. Reversals of intermediate courts of appeal abound and those reversals cannot, as suggested by respondents, be presumed to have been made upon an assumed untruth.

Respondents next suggest that the substance of petitioners' second question presented is an "apparent reflection on the integrity of the court below." The cause of justice and the whole system of American jurisprudence would have reached the brink of extinction if even an inference arose as to the integrity of a United States Circuit Court of Appeals, and any reflection so presumed in this case is mirrored in the thought processes of respondents' counsel from whence it arose and not through any writing or inference by petitioners. No court, not even this one, is so beyond the pale of error that the mere suggestion of their misapplication of the law controlling the case must be equated with a challenge of their integrity.

It is for this Court to decide whether as respondents say, the Circuit Court of Appeals merely disagreed upon

controlling state law, or, as petitioners aver, the controlling state law was in fact misapplied. It suffices to say that if the Maryland law is as recorded by the trial judge and the dissenting circuit jurist—the state law was misapplied.

Respondents continue, and like the guilty, flee when no man pursueth, in stating that petitioners' third question presented implies that the opinion of the majority was a subterfuge. Respondents might well devote more of their energies to a study of the dictionary—the opinion of the majority embodies no secret flight, nor plan, nor device to evade an issue. It does not require the perspicacity of an Oliver Wendell Holmes, a Louis Brandeis, or a Felix Frankfurter to decipher the error of the majority opinion—the error stands bold and clear—the controlling state law enunciated by the majority does not exist in the state case upon which the majority relies, nor in any other controlling state decision. There is no subterfuge—there is only error.

Contrary to respondents' statement, the questions presented are neither extremely narrow or complex. The judgment of the Circuit Court of Appeals which purports to follow, but in fact does not follow, controlling state law in diversity cases, descends upon every litigant within that circuit, and the importance of the correctness *vel non* of such judgment transcends the litigation from which it arose and its immediate effect upon litigants in the particular state here involved. That a United States Circuit Judge was once a member of the highest court of a state does not render him an unimpeachable oracle on the law of that state. Neither does this permit him the power to create state law in diversity cases from the circuit bench in complete derogation of controlling state decisions.

Respondents' Statement recites that the Court of Appeals unanimously denied rehearing, this is not correct.

Petition for Rehearing was addressed to the court en banc, composed of five judges. Only three judges signed the Order denying rehearing.

Respondents again misstate the Petition with respect to the second question presented—The *Grier* case was "the 'admitted controlling decision" by the majority, not petitioners. Petitioners admitted that *Grier* was controlling only if it contained the language attributed to it by the majority.

The majority is mistaken, and respondents thereby misled, in their statement that "The defendant in this appeal argues that *Grier v. Rosenberg* is not applicable because the evidence there offered in rebuttal of the presumption was so slight that the trial court would have been justified in holding that it was insufficient to be submitted to the jury in the face of the presumption." App. A., p. 17.

Such was never the written or oral argument of petitioners. Petitioners' position is correctly stated in the majority opinion (App. A., p. 17) and by respondents in their brief (p. 4), as being "The defendant here also argues that the presumption in *Grier v. Rosenberg* is different from the presumption of due care here considered and thus that case may not be taken as precedent."

Ordinarily, this Court gives additional weight to the expressions of a federal jurist upon state law, where that jurist was previously a member of the highest court of the particular state. However, the additional weight so given must be measured by the yardstick of consistency and *stare decisis* of the state. The expression of the majority, which included a former Chief Judge of the Maryland Court of Appeals, is inconsistent with prior decisions of the former state jurist on the effect of presumptions in negligence cases, as will be shown in the analysis of *Hickory Transfer Co. v. Nezbed*, 202 Md. 253, 96 A. 2d 241. Further, as shown in the Petition and as ably illustrated

by the dissenting circuit jurist, state *stare decisis* was ignored and the *Grier* case misapplied.

The striking similarities between the *Hickory Transfer* case, opinion by the then Chief Judge of the Maryland Court of Appeals, Simon Sobeloff, and the instant case, will be noted in parallel column comment:—

Hickory Transfer Case	*Instant Case*
Plaintiffs relied upon the inference[1] of negligence arising from the happening of an event.	Plaintiffs relied upon the presumption arising from the happening of the death of plaintiffs' intestate.
Plaintiffs introduced statements made to the investigating officer concerning the happening of the event.	Plaintiffs introduced statements made to the investigating officer concerning the happening of the event and the conduct of the deceased.
Plaintiffs' total evidence proved the details of the happening of the accident and was in conflict as to some of those details.	Plaintiffs' total evidence proved the details of the deceased's conduct, prior to his death, and was in conflict as to whether the deceased exercised due care for his own safety.
Held: That the inference of negligence was explained away by plaintiffs and they had proved too much and too little, the evidence not supporting the burden of proving the defendant's negligence.	The presumption of due care was explained away by specific evidence of the deceased's conduct, including evidence sufficient to support a jury finding of contributory negligence.

[1] In Maryland inferences and presumptions are without distinction.

The Maryland Court, in *Hickory Transfer*, held that the case of a defendant attempting to rebut an inference from the circumstances of an accident would permit a jury to disbelieve the testimony and rely upon the inference. However, as in the *Hickory Transfer* case and as in this case, "appellees are not in a position to repudiate their own evidence." Another distinction of the instant case—and a marked inconsistency between the opinion of the majority below and the opinion in *Hickory Transfer* and in *Grier*—is that, notwithstanding plaintiff's own evidence dispelling the presumption, defendants offered and adduced evidence as to plaintiff's conduct. Thus, the issue for the trier of fact was "Did the *evidence* of either party preponderate?"

The issue was drawn between evidence on both sides as to the conduct of the deceased and not between a presumption only on one side and rebuttal evidence on the other. Presumptions in Maryland are not evidence and in the light of evidence, cannot endure.

CONCLUSION.

For the reasons contained in the Petition and in the Reply, petitioners respectfully request that a Writ of Certiorari issue.

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